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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 658

BENJAMIN FRANKLIN COLLINS,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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(Figures in parentheses refer to pages of Petitioner's Appendix unless context clearly indicates otherwise)

The nature of the Government's opposition of review in this case suggests that an elaboration of Petitioner's position may be of assistance to the Court.

I.

To begin with, the Government completely ignores the effect of the decision by this Court in *Weiler v. United States*, 323 U. S. 606. Significantly, it is not even cited by the Government.

The reliance of the Government on the *United States v. Wood*, 14 Pet. 430 is surely misplaced, since the minutes prepared by persons other than the petitioner are not documents such as the "invoice books" and the "thirty-five original letters from the defendant" in the *Wood* case.

Government Counsel rely on the authority of English cases which, in our view, shed little light upon the problem. For example, Chief Justice Parker in the *Queen against Muscot*, 10 mod. 192 (1714), 88 Eng., reports 689, merely drew the long recognized distinction between a Prosecution for Perjury (or, for that matter any criminal case) and "a bare contest about property," and enunciated the rule, now applicable to all criminal prosecution that "presumption is ever to be made in favour of innocence".* The trouble in the case at bar is that the court below applied to perjury the identical test used in all criminal prosecutions, namely "whether the evidence is of a quality to assure that a guilty verdict is solidly founded"; thus, in effect, abrogating the rule peculiar to perjury prosecutions.

II.

It was improper for the court below to sustain the convictions on appeal by deciding against petitioner, a vital, factual issue which the trial judge refused to submit to the jury at the trial. The petitioner requested the trial judge to charge that "The Government has produced no direct evidence bearing on the issue of the falsity of the alleged perjured testimony" (174a). Instead the trial court charged: "The evidence given by the witness Smith is the direct evidence of a living witness necessary to support

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* Moreover, these English decisions antedate the perjury Act, 1911, 1st and 2nd Geo. V, Ch. 6, Sect. 13, cited by this court in *Weiler v. U. S.*, *supra* at 610, note 4.

a perjury prosecution * * *" (186a-187a). An exception was taken to this portion of the charge (196a).

The court below in affirming the conviction, however, stated that whether the evidence is direct "should not be the criterion here" and "The testimony, although in a sense circumstantial, is absolutely inconsistent with Collins' innocence * * *" (Pet. 23-24).

Here, therefore, as in *Gruneuald v. United States*, 353 U. S. 391, the Court of Appeals has sustained a conviction on a theory of facts never submitted to, nor passed upon by the jury. Clearly, an appellate court may not under the *Gruneuald* rule, sustain a conviction on a ground not passed upon by the trier of the facts.

III.

We submit that the conduct of the Government prosecutor before the Grand Jury under the circumstances of this case calls for condemnation by this Court, in order that the rights of all individuals appearing before the Grand Jury be adequately safeguarded.

On April 24, 1957, the petitioner appeared before the Grand Jury and was asked the following questions by the Government prosecutor (53a-56a):

> "Q. Now, looking at the date of these minutes, March 11, 1953, can you tell this grand jury when you signed these minutes? (132) A. Well, I believe I signed them when they were finished.
>
> "Q. What do you mean you believe? Is there any doubt about that? If you have any doubt, tell us, and if you have no doubts, tell us that. A. I don't quite follow you, sir. When the girl finished them, more than likely I signed them right then.

"Q. Is it your recollection that you signed these minutes of March 11, 1953 at or about or shortly after March 11, 1953? A. Yes, sir; I believe so.

"Q. Is that your sworn testimony, Mr. Collins? A. I believe so, yes.

"Q. Not you believe. Is that your sworn testimony, that you signed these minutes of March 11, 1953 either March 11th, the 12th or the 13th of thereabouts? A. Shortly thereafter, yes, sir. I believe so.

"Q. Pardon? A. Yes, sir.

"Q. That's your sworn testimony? A. Yes, sir.

"Q. Are you sure you did not sign these minutes of March 11, 1953 in the year 1954? A. No, sir, I did not sign them in 1954.

(133) "Q. Are you sure of that? A. Why, certainly.

"Q. Are you sure you signed them before 1954? A. I believe that I signed them in the month of March 1953.

"Q. Are you positive that you did not sign these minutes of March 11, 1953 in the year of 1954 or later? A. Yes, sir; I am positive I did not sign them in 1954.

"Q. Are you positive that you signed these minutes of March 11, 1953 at the latest sometime at the end of the year of 1953? A. You are getting me mixed up now.

"Q. Don't get mixed up. I want you to think clearly. This is a serious business this grand jury is investigating. A. I would like to say I am almost positive I signed them shortly after March 11, 1953.

"Q. So at the very—when you say shortly after, what limit would you place on it to play safe? What do you say was the outside limit of March 11, 1953? A. I would say about two or three days after.

"Q. So you did not sign these minutes of March 11, 1953—let's play safe—is it your sworn testimony (134) that you did not sign these minutes of March 11, 1953 after April of 1953? A. Yes, sir.

"Q. Are you positive that these minutes of March 11, 1953 were signed at least sometime between March 11, 1953 and April 1st, 1953? A. Yes, sir.

"Q. That would be a fair leeway, is that right? A. I think so, yes, sir. I would say that would be a fair leeway.

"Q. That's a fair question? A. As far as I can see.

"Q. There is no trick to my question? A. No, sir.

"Q. It is your positive testimony that you signed these minutes of March 11, 1953 sometime between March 11, 1953—but at all events before April 1st, 1953? A. I believe you are right, sir.

"Q. Pardon? A. I believe you are right, sir.

"Q. You say I am right. Is that what your testimony is? A. Yes, sir.

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"Q. Tell us once again, between September 9, 1953 and October 1, 1953, what did you do with respect to those minutes of September 9, 1953? A. I signed them in my own handwriting.

"Q. There is no question about it? A. I don't think there could be any question.

"Q. You say 'I don't think.' I don't want any mental reservations from you. Is that the fact, that you signed it sometime between September 9, 1953 and October 1st, 1953? A. I signed them."

The Government prosecutor, while interrogating the witness, had a report, made by a document examiner on April 8, 1957 (99a), which indicated that the minutes had been typed on a typewriter that was not available at the time the minutes, dated September 9, 1953 and March 11, 1953, were signed. A reading of the above testimony clearly indicates that the prosecution deliberately instigated and entrapped the witness into making his statements before this Grand Jury solely in order to obtain the *coup de grace*. See dis-

senting opinion by Judge Learned Hand in the *United States v. Remington*, 208 F. 2d 567, 571 (C. A. 2 1954).

"The history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law." Thus spoke the Court in *McNabb v. United States*, 318 U. S. 332, 347. Those sentences have often been repeated, perhaps to the verge of rendering them hackneyed. But we think it is just as true today as in 1913 that "we need education in the obvious more than investigation of the obscure" (*Holmes, Speeches*, 99), and so we do not apologize for recurring to the fundamental truth articulated in McNabb.

We submit that before a Federal conviction, obtained by Federal ratification of "such di y business" is sustained, review by this Court should be had.

Accordingly, for these additional reasons, we believe that the present case calls for review by this Court.

Respectfully submitted,

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GEORGE S. FITZGERALD,
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Dated: February 26, 1960.